

May 20, 2008

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**RE: EX PARTE PRESENTATION
MB Docket No. 07-51 – Exclusive Service Contracts for
Provision of Video Services in Multiple Dwelling Units and
Other Real Estate Developments**

Dear Ms. Dortch:

On May 7, 2008, David Catania of OpenBand Multimedia, LLC, and I met with several members of the staff of the Media Bureau regarding the above-captioned proceeding. Our discussion at that meeting focused on OpenBand's opposition to a proposal to prohibit bulk service agreements between providers of video programming services and community associations at multiple dwelling units and other real estate developments. As we explained during the meeting and as OpenBand has described in its filed comments, bulk service agreements between community associations and competitive video service providers like OpenBand deliver significant value to consumers in the form of lower prices and greater service choices. They also enable entrepreneurial companies like OpenBand to acquire debt and equity funding necessary to support their network investments. These investments have resulted in the successful delivery, in OpenBand's case, of next generation network services, including fiber to the premise (FTTP), to consumers over five years in advance of any competitive service offering from large national cable and telecommunications service providers.

During that meeting, a member of the Media Bureau staff notified us that the Commission has received several comments in this proceeding from homeowners in the Southern Walk at Broadlands development in Loudoun County, Virginia -- one of three communities in Loudoun County where OpenBand provides services. Several of those comments were critical of certain aspects of OpenBand's service. Mr. Catania and I committed to reviewing those comments and providing a response to the Commission. The purpose of this letter is to provide that response.

While we will not in this letter address each individual complaint, we will respond to the primary issues articulated in those comments. The filed letters addressed three main areas: service pricing, service quality, and the terms and duration of the bulk service agreement in place between OpenBand and the homeowners association ("HOA").

Pricing

A few comments have taken issue with the pricing of OpenBand's services. For example, one commenter contends that OpenBand's rates are "far higher than the industry average" and that the "inability to choose our own provider gives us no protection against unreasonable price increases." However, the facts belie those assertions.

OpenBand's customers are protected from high rates and unreasonable price increases by the terms of the contract between OpenBand and the HOA. Under the contract, residents are guaranteed rates that are 10 percent lower than rates charged by other service providers in Loudoun County for comparable service. As a result, on average, the price paid by residents of Southern Walk at Broadlands for this service package has increased by only 1.1 percent per year since its inception in 2002. For 2008, OpenBand's rates are unchanged from 2007 and will remain unchanged through May 2009.

The price for the package of services is adjusted annually based upon a competitive analysis of the prices for comparable services offered by other providers in Loudoun County. This analysis and all of the underlying documentation is presented to the HOA.

Should any homeowner wish to challenge how the rates are developed, Section 5.7 of the contract specifically provides that "[a]ny Homeowner may challenge [OpenBand]'s pricing as violating this Section." In addition, the contract includes a dispute resolution procedure that is available to all individual homeowners to pursue their challenge. Interestingly, while some commenters have objected to OpenBand's prices in the context of comments filed in the instant docket, no resident has ever attempted to utilize the remedy available to them under the contract with OpenBand.

OpenBand is fulfilling its commitment under the contract by offering service at lower prices than those charged by its competitors. Some commenters point to short-term and promotional prices offered by certain competing providers as evidence that they are paying more than they should. The contract, however, specifically exempts short-term and promotional pricing from consideration as a comparable price. Nonetheless, on closer inspection, these promotional prices often contain hidden costs like equipment rentals, fees and taxes that significantly increase the real price of service above the advertised promotional rates.

Service

Several comments take issue with the quality of OpenBand's service. Upon receipt of those comments, OpenBand's staff reviewed all of the complaints and calls for service of the individuals who filed comments in this proceeding. While OpenBand accepts full responsibility when its service fails to satisfy its customers, there are occasions when service disruptions occur which are beyond the control of the company, including defective products supplied by the manufacturers of some of our systems as well as occasional weather-related service disruptions. Temporary service disruptions and customer premises equipment failures are problems endemic throughout the multichannel video programming distribution industry. No provider including OpenBand is wholly immune from those occasional service problems. Nonetheless, OpenBand's state-of-the-art fiber to the premise digital network is as reliable as that of any in the MVPD industry. OpenBand remains committed to providing the best possible service to its customers and it is continuously attempting to improve the operation of its network and its responsiveness to customer service complaints.

Terms of the Contract

The contract between OpenBand and the HOA was a carefully negotiated agreement. In exchange for OpenBand's commitment to invest tens of millions of dollars into delivering broadband services at a discounted price, the HOA agreed to a bulk billing contract. OpenBand has fulfilled its end of that bargain. Because of this contract, the HOA's membership received cutting edge fiber to the premises services -- at discounted rates -- five years before they were offered by any other service provider in Loudoun County. Several of the commenters attest to the fact that they welcomed OpenBand's service when they moved to Southern Walk at Broadlands.

Now a small portion of the residents object to the length of the contract and the inability to opt out of the bulk billing arrangement. Stated differently, they feel entitled to abrogate their contract. A few commenters use words like "forced" and "held hostage" to describe their relationship with OpenBand. These are curious terms to describe a contract that was disclosed and agreed to by each resident prior to the purchase of their property.

Thus, having benefited from OpenBand's investment, those residents now appeal to the Commission to liberate them from all responsibilities and contractual obligations - obligations contained in a contract about which they were fully informed and which they freely and voluntarily entered into when they purchased their residences. The submission of a small number of comments from residents of this community should not cause the Commission to lose sight of the fact that OpenBand has brought to all the residents of that community state-of-the-art high speed video, Internet and telecommunications service. It bears repeating that none of those services would have been economically viable at the time of installation without the financial certainty made possible by the bulk service agreement between OpenBand and the HOA, and that no large national cable and telecommunications providers were offering a service even remotely approaching the OpenBand FTTP solution in the Washington metropolitan region.

Conclusion

For the reasons described in this letter as well as those set forth in prior OpenBand submissions in this proceeding, OpenBand respectfully urges the Commission not to interfere with lawfully negotiated bulk service agreements between video service providers and community associations. In the event that the Commission feels compelled to impose limitations on such agreements, OpenBand asks the Commission to avoid a "one size fits all" policy. OpenBand submits that whatever public interest benefits may accrue from limitations on large national cable and telecommunications operators entering into such bulk service agreements, such limitations would not be appropriate for smaller, independently-owned entrepreneurial companies like OpenBand, who utilize such agreements to finance and deliver high speed broadband services, including video services, to consumers far in advance of the time frames within which such services are provided by large cable and telecommunications network operators.

Sincerely,

A handwritten signature in black ink, appearing to read "MFB", followed by a horizontal line.

Mitchell F. Brecher
Counsel for OpenBand Multimedia, LLC

cc: Ms. Mary Beth Murphy
Ms. Nancy Murphy
Mr. John Norton
Mr. John Berresford
Ms. Holly Saurer